

# REVISED LAWS

# MINNESOTA

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homestead works a forfeiture of the old one (29-18, 11+119). Where there has been a loss of exemption by abandonment a resumption of occupancy as a home does not have a retroactive effect, but merely gives a new right as of the date of the resumption (71-108, 73+639). Where a homestead right is lost by removal and failure to file the statutory notice the premises do not pass to the surviving spouse under § 3647 (40-172, 41+1059). An outstanding interest is not a thing separate from the land so that its acquisition by the claimant affects the exemption (27-406, 7+824).

**3459. Selection after levy**—If the premises so owned and occupied by the debtor or claimed under him by another as exempt shall exceed the area herein prescribed, and the homestead shall not have been set apart as such and its boundaries defined, an attachment or execution may be levied upon the whole. Thereupon the person entitled to the benefits of such exemption shall deliver to the officer making said levy a description of the part claimed as exempt, and the remainder only shall be subject to the levy so made. (5523)

A sale of the whole of a tract including a homestead is void as to the whole if no selection is made, either by the officer or the claimant (25-183; 27-156, 6+618; 30-84, 14+364; 31-213, 17+341; 36-388, 31+353; 37-208, 34+23; 30-259, 15+118; 91-482, 98+463). A selection is conclusive if voluntarily made by the claimant (See 78-295, 80+1127).

**3460. Selection, how made**—Such selection shall embrace the site of the dwelling and its appurtenances, shall be compact in form, and shall be so made as not unreasonably to affect the value of the remaining part. If the selection be not made within twenty days after notice of the levy, or if, when made, it be not satisfactory to the creditor procuring such levy, the sheriff shall cause such homestead to be set apart by a survey, beginning at a point designated by the claimant, or, if no such designation be made, at such point as the sheriff shall direct, and the cost of such survey shall be added to the debt and paid out of the proceeds of sale. (5523, 5524)

The selection must be reasonable and the tract carved out regular and compact in shape. The dwelling-house and appurtenances must be included (61-238, 63+632. See 70-546, 73+842). It will be presumed that an officer making a selection discharged his duty (91-482, 92+463).

## CHAPTER 67

### CHATTEL MORTGAGES AND CONDITIONAL SALES

#### CHATTEL MORTGAGES

**3461. Mortgages, when void**—Every mortgage of personal property shall be void, as against the creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith, unless it appears that such mortgage was executed in good faith, and not for the purpose of hindering, delaying, or defrauding any creditor of the mortgagor, and unless, in addition thereto, the giving of such mortgage is accompanied by immediate delivery, and followed by actual and continued change of possession of the mortgaged property, or, in lieu thereof, the mortgage is filed as hereinafter provided. ('97 c. 292 s. 1)

**1. What must be filed**—All forms of chattel mortgages, including those of an equitable nature, must be filed (37-82, 33+117; 35-399, 29+52; 68-282, 71+389; 51-321, 53+712). A real estate mortgage covering "fixtures" need not be filed as a chattel mortgage (35-543, 29+349).

**2. What constitutes filing**—Under G. S. 1878 c. 39 it was held that a mortgage was filed when it was delivered to and received and kept by the proper officer for the purpose of filing (42-117, 43+791), and that indexing was not essential (25-81). The present statute is different (§ 3464).

**3. Effect of filing**—Filing has the same effect as a taking of possession by the mortgagee (32-377; 20+364; 35-399, 29+52; 52-497, 55+60; 74-58, 76+965, 1125; 75-118, 77+568. But see 21-187). It operates as notice to all persons of the existence and terms of the mortgage (§ 3464; 32-377, 20+364; 35-399, 29+52; 52-497, 55+60; 74-58, 76+965, 1125; 75-118, 77+568; 7-225, 166; 44-204, 46+335; 41-218, 43+137; 71-230, 73+959, 74+891; 66-344, 69+1). The filing of a mortgage on a growing crop of grain continues to be construc-

tive notice to all the world although the grain is threshed and removed from the land on which it is raised (66-344, 69+1). Where a mortgage is given for future advances the filing of a second mortgage is not constructive notice to the first mortgagee (69-82, 72+52). When a mortgage is duly filed the retention of possession by the mortgagor only makes the mortgage prima facie fraudulent (25-297). It is not necessary for the mortgagee to take possession after default to make the filing effectual as notice. The force of the filing as notice is not dependent on there being no default (32-377, 20+364). Under G. S. 1894 § 4131 the filing operated as notice for only two years. The force of the filing as notice is not affected by the chattels subsequently being attached to realty (71-230, 73+959, 74+891).

**4. Priority among mortgages as affected by filing**—Where possession is not delivered a prior mortgage will be postponed to a subsequent bona fide mortgage, if not duly filed when the latter is executed, although the former may be subsequently filed prior to the filing of the second mortgage (30-270, 15+243). Precedence cannot be secured by priority of filing contrary to an agreement between all the parties (28-394, 10+420). When two mortgages are executed contemporaneously without agreement as to precedence no precedence can be secured by priority of filing. When two mortgages are executed on the same day they are presumed to have been executed contemporaneously in the absence of evidence to the contrary (72-496, 75+709). Priority as between contemporaneously filed mortgages may be shown by parol (30-419, 15+687). As between mortgages on separate undivided shares of a growing crop no precedence can be secured by priority of filing (62-143, 64+146).

**5. Effect of not filing**—As between the parties filing is immaterial (33-375, 23+540). It is immaterial as to creditors (52-497, 55+60. See 35-534, 29+345), and subsequent purchasers (41-218, 43+137), or mortgagees (31-518, 18+647; 33-104, 22+126. See 42-488, 44+517), with actual notice. It is also immaterial when the mortgagee takes actual possession (25-297; 32-377, 20+364). If the mortgagor remains in possession the statute makes an unfiled mortgage void as to creditors, subsequent purchasers and incumbrancers (23-182; 25-297; 31-518, 18+647; 32-381, 20+334; 34-416, 26+237; 66-344, 69+1; 48-479, 51+383; 32-259, 20+187; 30-270, 15+243; 51-321, 53+712), but not as to others (32-529, 21+733; 64-254, 66+971). A mortgage not properly filed until after an assignment for the benefit of creditors under the insolvency law is void as to the creditors of the assignor (35-543, 29+349; 37-82, 33+117; 46-240, 48+1019; 67-287, 69+920). The term "void" means voidable (31-518, 18+647).

**6. Effect of delay in filing**—A delay in filing is not fatal. If a mortgage is filed or the mortgagee takes actual possession before any other right or lien attaches it is good against everybody if it was previously good between the parties (74-58, 76+965, 1125; 74-130, 76+946).

**7. Who may object to want of filing**—One who is not a subsequent purchaser, incumbrancer or attaching creditor cannot object (36-156, 30+659; 47-403, 50+368; 32-529, 21+733; 64-254, 66+971). A receiver of a partnership cannot (60-161, 61+1131; 60-397, 62+383). A receiver of a corporation appointed under G. S. 1878 c. 76 §§ 9, 10 may (35-543, 29+349). An assignee or receiver for the benefit of creditors may, and without reducing the claims of the creditors to judgment (52-497, 55+60; 37-82, 33+117; 68-282, 71+389; 48-479, 51+383). Creditors must become judgment creditors and levy on the property before they can raise the objection (36-156, 30+659; 47-403, 50+368; 52-497, 55+60; 31-518, 18+647). A purchaser from an assignee for the benefit of creditors may (67-287, 69+920). Parties with actual notice cannot (See Note 5 supra).

**8. Burden of proving good faith**—A person claiming under a mortgage which is filed but under which the mortgagor remains in possession has the burden as against creditors and subsequent purchasers or mortgagees in good faith, of proving good faith and absence of intent to defraud on the part of the mortgagor (25-297; 31-518, 18+647; 32-381, 20+334; 34-416, 26+237; 66-344, 69+1; 48-479, 51+383; 55-195, 56+814); but not as to others (64-254, 66+971). A person claiming as a subsequent purchaser from a mortgagor has the burden, as against those claiming under the mortgage, of proving that he was a bona fide purchaser although the mortgage was unfiled (33-375, 23+540; 44-541, 47+164). Creditors seeking to take advantage of a want of filing have the burden of proving their own good faith (52-497, 55+60). Subsequent mortgagees have the burden of proving good faith as against prior mortgagees whose mortgages are unfiled (51-321, 53+712; 71-230, 73+959, 74+891; 30-270, 15+243. See § 3357 Note 10). A purchaser of a mortgagee in possession is not required to prove the good faith of the mortgagee (20-81, 66). A subsequent mortgagee has the burden of proving that a prior mortgagee had notice when making advances subsequent to the filing of the subsequent mortgage (69-82, 72+52). Where the amount of the debt is overstated in a mortgage the mortgagee has the burden of proving the good faith of his mortgage as against creditors (62-338, 64+825).

**9. Burden of proving change of possession**—23-182.

**10. What is good faith—Evidence of—Want of notice and the payment of a valuable consideration are the two essential elements of good faith in this connection (51-321, 53+712; 31-518, 18+647). Proof of the payment of a valuable consideration in the ordinary course of business under circumstances free from suspicion makes out a prima facie case of good faith and shifts the burden of proving notice on the opposite party (30-270, 15+243; 51-321, 53+712; 44-541, 47+164; 66-344, 69+1; 34-103, 24+364; 70-528,**

73+415. See 67-311, 69+1079; § 3357 Note 10). The character and degree of proof required depends much on the circumstances of each case (30-270, 15+243). To make one a bona fide purchaser he must have been without notice at the time of paying the consideration (20-81, 66). One who takes from the mortgagor a bill of sale in payment of a precedent debt and without notice of the mortgage is a purchaser in good faith (21-187). Notice to an officer making a levy is not notice to the judgment creditor (23-182). Notice or want of notice to an assignee for the benefit of creditors is immaterial. The rights of the creditors are fixed when the assignment is made (52-497, 55+60).

**3462. Where filed**—Every such mortgage, when executed in the presence of two attesting witnesses and duly acknowledged, may be filed with the clerk or recorder of the town or municipality in which the mortgagor resided at the time of its execution, if a resident of the state, or of that in which the property was then situated, if a non-resident. If such place be in an unorganized town, the filing may be with the register of deeds of the county. Duplicates of such mortgage, or copies thereof certified by any officer with whom it has been properly filed, may be filed in other places wherein any part of such property was situated when the same was made. ('97 c. 292 ss. 2, 4; '99 c. 18)

**1. Place of filing**—The statute is applicable to mortgages on crops to be grown (35-399, 29+52). Under G. S. 1894 § 4130 a village was not a part of a township for purposes of filing (58-536, 60+671; 22-39, overruled by statute), but a borough was (34-410, 26+237). The provision for filing a duplicate or copy in places where the property is situated other than at the residence of the mortgagor is probably not applicable where the property is so situated only temporarily or casually (72-496, 75+709). Under G. S. 1894 § 4130 a copy of the mortgage was required to be filed where the mortgagor resided if the property was situated elsewhere (42-37, 43+685; 71-230, 73+959, 74+891). Chattels are presumed to be situated at the owner's residence (21-187. See 71-230, 73+959, 74+891). Mortgages filed in a sister state need not be filed here upon a removal of the property (32-377, 20+364; 77-210, 79+674). Evidence held sufficient that property was located where the mortgage was filed (36-333, 31+348). A party claiming under a mortgage must prove that the mortgagor resided where the mortgage was filed. A recital in the mortgage as to the residence of the mortgagor is not evidence against a subsequent mortgagee or purchaser (71-230, 73+959, 74+891. See 90-451, 97+128).

**2. Acknowledgment**—No acknowledgment is necessary as between the parties (45-40, 47+449), or as to subsequent purchasers or mortgagees with notice (52-497, 55+60). Formal defects and clerical errors are not fatal (37-58, 33+214; 43-59, 44+880; 49-370, 52+27), but the want of a notary's seal is (39-102, 38+801. See 43-59, 44+880). The fact that the acknowledgment was taken before a person disqualified by interest does not prevent the mortgage from being filed and operating as constructive notice (45-40, 47+449). A mortgage cannot be filed without an acknowledgment (66-434, 69+223). An acknowledgment taken before a justice of the peace in North Dakota held insufficient without a certificate as to the authority of the justice (90-451, 97+128).

**3463. Duties of recording officer—Fee**—Every officer having the custody of town, county, city, or village records shall receive such chattel mortgages, and all other contracts and instruments referred to in this chapter, and immediately number, file, and index the same, and certify on the back of each the exact time of receipt, which certificate shall be prima facie evidence of the facts stated therein. No such instrument shall be removed from the office where filed until canceled, released, or satisfied. The fee for each instrument shall be ten cents. ('97 c. 292 s. 3)

**3464. Index books—Limit of lien—When notice**—Every such officer shall keep in his office an index book, in which he shall enter the number given to every such instrument, the names, in alphabetical order, of the mortgagee and mortgagor or vendor and vendee, the sum secured thereby, the exact time of filing, and of satisfaction when made. Every such instrument so filed shall be notice to all persons of the existence and terms thereof. The lien of any mortgage so filed shall continue until the debt secured thereby is paid or barred by statute; but as against creditors of the mortgagor and purchasers or mortgagees of the property in good faith it shall not continue more than six years from the date of filing, unless the indebtedness is not then due and payable by its terms, in which case it shall so continue for two years after the maturity of the debt and no longer. ('97 c. 292 s. 4; '01 c. 146)

See § 3461 Note 3.

**3465. Mortgage of exempt property**—No mortgage, pledge, or other incumbrance of the following personal property, to wit: the family Bible, family pictures, school books or library and musical instruments for the use of the family; all wearing apparel of the debtor and his family; all beds, bedsteads and bedding kept and used by the debtor and his family; all stoves and appendages put up or kept for use of debtor and his family; all cooking utensils; and all other household furniture not herein enumerated not exceeding five hundred dollars in value; one sewing machine, given or made by a married man or woman, shall be valid as to such exempt property unless it be by written instrument, jointly executed and acknowledged by husband and wife, if both are living. ('97 c. 292 s. 5; '01 c. 12)

Probably not applicable to purchase money mortgages (8-207, 178; 77-210, 79+674).

**3466. Satisfaction—Penalty**—When the conditions of a chattel mortgage have been fully performed, the mortgagee, his representatives or assigns, shall give duplicate satisfactions thereof, one of which he shall deliver to the owner of the mortgaged property, and the other he shall file at his own expense, with the officer having custody of the mortgage. Thereupon such officer shall note the satisfaction in his index and surrender the mortgage. Such satisfactions need not be witnessed or acknowledged. Failure to file such satisfaction within sixty days after condition performed shall subject its holder to treble damages at the suit of any person injured by such neglect. ('97 c. 292 s. 6)

**3467. Redemption before sale**—Whenever any condition of such mortgage is broken, the mortgagor, or any person lawfully claiming under him, may redeem the same, at any time before the right of redemption is foreclosed, by paying or tendering to the holder, his authorized agent or attorney, the sum due on the debt secured, or by offering performance of the thing to be done, together with all lawful charges and expenses incurred in the care of the property. Such payment, or tender if kept good, when made by the owner, shall discharge the lien of the mortgage; and when made by a subsequent purchaser, mortgagee, or creditor having a lien it shall subrogate him to all rights of the holder of the mortgage. ('97 c. 292 ss. 7, 8)

**1. Right of redemption**—A right of redemption is an essential element of every mortgage (20-411, 363; 74-439, 77+236; 25-513). This right is subject to garnishment (27-32, 6+406), and to levy on execution and attachment (§ 4302; 39-132, 39+73). If the mortgagee refuses to deliver possession upon redemption being made under this section an action for conversion will lie (79-279, 82+587). The redemptioner must pay all reasonable expenses of the care and custody of the property (79-279, 82+587; 25-135).

**2. Tender**—A tender must be unconditional (52-83, 53+809; 80-223, 83+50), sufficient in amount (42-49, 43+691; 45-335, 47+1072; 25-135; 45-40, 47+449; 17-284, 260), and made at the proper place (21-456). It may exclude the idea that it is in part payment of the debt. It may be made by an assignee in insolvency or a vendee (80-223, 83+50). It may be made to an attorney for collection (60-483, 62+1126), or to one of several joint mortgagees (53-23, 55+115). An acceptance must be unqualified (80-223, 83+50). The mortgagee must be given opportunity to ascertain the amount due (43-428, 45+857). Prior to 1897 c. 292 § 8 a tender after default extinguished the lien although not kept good (43-428, 45+857; 45-40, 47+449; 80-223, 83+50). The sufficiency of a tender is for the jury (43-428, 45+857. See 17-284, 260). Objection to the right of a party to make tender must be made at the time or it is waived (80-223, 83+50. See 17-284, 260).

**3468. Foreclosure, when and where made**—No mortgagee, nor any one claiming under him, shall arbitrarily, or without just and sufficient cause, declare any condition or stipulation of a mortgage broken prior to a default in the performance thereof; but whenever such mortgage authorizes a sale in case of default, upon condition broken, the mortgage may be foreclosed and the property sold, at public sale and in public view, at some convenient place in the county where the same, or some portion thereof, is situated at the time of the commencement of foreclosure proceedings, or in which the mortgage is filed. ('97 c. 292 s. 9)

**1. Default—Declaring forfeiture**—Prior to 1879 c. 65 § 2 it was held that the usual insecurity clause in a mortgage authorized the mortgagee to take possession whenever he chose regardless of whether or not he had reasonable grounds for considering himself insecure (42-102, 43+835. See 21-482; 27-371, 7+687). Under this section he must have reasonable grounds for his belief based on facts (42-102, 43+835; 80-458, 83+451; 30-301, 15+249). Giving a second mortgage is not alone sufficient ground (64-

212, 66+722), nor is a levy on the mortgagor's interest (72-248, 75+219). Where the mortgagor attempts to dispose of or remove the property a taking of possession by the mortgagee in such case is not to declare a default arbitrarily within the meaning of this statute (61-528, 63+1114). Whether just cause exists is a question of fact (80-458, 83+451). Whether there has been a breach of condition or a default depends on the facts of the particular case (See 20-411, 363; 39-490, 40+568; 55-323, 56+1066). Whether there has been a waiver of a breach of condition or whether just cause exists for declaring a forfeiture are questions of fact (80-458, 83+451).

**2. Possession for foreclosure**—Upon default or breach of condition the mortgagee has a right to the possession without foreclosure proceedings (32-193, 20+85; 39-102, 38+801; 43-428, 45+857; 37-135, 33+550; 44-204, 46+335; 45-99, 47+452), but this right of possession is only for the purpose of foreclosure or sale under the mortgage to satisfy the debt and not for the purpose of using the property (39-102, 38+801. See 42-49, 43+691). But he is not required to take possession within a reasonable time in order to protect his lien (80-223, 83+50). Although the mortgage covers much more property than is necessary to the security of the mortgagee he may take possession of the whole for the purpose of foreclosure (25-513). Taking possession by the mortgagee after default and converting the property without foreclosure proceedings may operate as a discharge but the mortgagee cannot elect to accept the property in payment of the debt (52-232, 53+1148).

**3. Who may foreclose**—The equitable owner of a mortgage may foreclose in the name of the legal owner (44-521, 47+150).

**4. Fraudulent mortgage**—A mortgagor may resist the foreclosure of a fraudulent mortgage (36-123, 30+439).

**5. Foreclosure by action**—The remedy afforded by this section is not exclusive. A chattel mortgage may be foreclosed by action although it contains a power of sale and although the mortgagee may recover possession by action (30-35, 14+61; 69-82, 72+52; 32-193, 20+85; 30-125, 14+513; 47-183, 49+740; 72-344, 75+208, 76+41).

**3469. Notice and sale**—At least ten days before sale a notice containing (1) the names of the mortgagor and mortgagee, and of the assignee, if any; (2) the date of the mortgage; (3) the nature of the default and the amount then due; (4) a description of the property; (5) the time and place of sale; (6) the name of the party, agent, or attorney foreclosing, and, when an attorney, for whom—shall be served upon the person from whose possession the property was taken, and upon the mortgagor, if he resides or can be found in the county where foreclosure is had, in the manner, provided for service of a district court summons, and ten days' posted notice shall also be given. At the time and place of sale the person conducting the same shall sell the property, or so much thereof as shall satisfy the debt secured, with costs and expenses, and deliver the remainder, if any, to the owner. ('97 c. 292 ss. 9, 10)

**1. The notice**—The provision for posting the notice must be followed strictly and an affidavit of posting must show such compliance affirmatively. There is no provision for personal service of the notice on subsequent mortgagees (89-229, 94+682). It is an open question whether a mistake in the notice as to the default, there being in fact a default, vitiates the sale (88-392, 93+309). It need not be signed by the officer who is to conduct the sale (52-232, 53+1148). Under 1879 c. 65 § 1 it was necessary that reasonable effort should be made to find the mortgagor for the purpose of making a personal service of the notice upon him. 1885 c. 171 did not render personal service unnecessary (52-232, 53+1148).

**2. Mortgagee a trustee**—A mortgagee stands with respect to the mortgagor's rights in the property as a trustee and is held to the exercise of good faith and proper care and diligence to avoid any sacrifice of those rights not necessary to the reasonable enforcement of his own (25-513).

**3. Sale of part**—Where, without prejudice or great inconvenience to himself, the mortgagee can satisfy his debt by a sale of part of the property mortgaged he is bound to do so if the interests of the mortgagor require it (25-513).

**4. Amount for which sold**—The amount for which the property is sold may include the expense of obtaining possession (42-49, 43+691; 25-135); the expenses of the sale (25-135); and attorney's fees (See § 3471).

**5. Inadequate price**—Gross inadequacy of price is not alone ground for setting aside the sale (48-333, 51+220).

**6. Distribution of proceeds**—The proceeds of the sale must be distributed among all who have a beneficial interest in the mortgage (89-136, 94+435).

**7. Presumption**—The sale is presumed to have been conducted fairly (23-212).

**3470. Report of sale**—Filing—Within five days after sale the person making the same shall file in the office where the mortgage was filed a verified, or, if he be an officer, a certified, report of his proceedings, specifying therein the property sold, and that returned, if any, and the amount received, and an

itemized statement of all costs and expenses, the amount applied on the mortgage, and the amount, if any, returned to the owner. When so filed, such report, or a certified copy thereof, shall be prima facie evidence of the facts therein stated. ('97 c. 292 s. 11)

**3471. Attorney's fee**—Whenever an attorney's foreclosure fee is provided for in the mortgage, the amount thereof may be deducted and paid only when such attorney, within ten days after sale, shall file in the office where the mortgage was filed his affidavit that he is a regularly admitted attorney of this state, that he foreclosed such mortgage, and has received or is entitled to said fee. ('97 c. 292 s. 12)

Attorney's fees cannot be charged if no attorney is actually employed (45-40, 47+449), or if there is no foreclosure (42-49, 43+691).

**3472. Redemption after sale**—At any time within two days after sale any of the parties entitled to redeem before sale may redeem the property sold, or any part thereof which has been sold separately and for a separate price, by paying to the purchaser or his assigns the amount for which the same was sold, with costs and expenses of keeping during the time allowed for redemption. Such purchaser shall deliver the property to the person so redeeming, and execute a release to him, and, if notice of intention to redeem be given at or before the sale, the person selling shall retain possession during such time, unless sooner redeemed. ('97 c. 292 s. 13)

**3473. Mortgagee may purchase, when**—The mortgagee, his representatives or assigns, may fairly and in good faith purchase any property sold as aforesaid when the sale is conducted by the sheriff, his deputy, or any constable of the county. ('97 c. 292 s. 14)

Under 1885 c. 171 a policeman in Minneapolis held authorized to conduct the sale so as to permit the mortgagee to purchase (48-333, 51+220). A purchase by the mortgagee at a void foreclosure sale is not a conversion (52-232, 53+1148).

**3474. Mortgaged property subject to garnishment, etc.**—The interest of the mortgagor or his assigns in such property may be subjected to garnishment, attachment, or execution, and when levied upon the officer may take it into his possession; but he, or the creditor, shall forthwith cause a written demand to be served upon the owner of the mortgage or his agent for a statement of the amount remaining due thereon. Within three days thereafter such owner shall furnish a verified statement of the original amount secured, rate of interest, amount and date of all payments, the balance then due, and all costs and expenses incurred. Such creditor, within twenty-four hours after receipt of such statement, shall pay to the person entitled thereto the amount then due, and in default thereof his levy shall be released and the property returned; but upon payment of such amount the creditor shall be subrogated to all the rights of the owner of the mortgage, and entitled to the evidence of the indebtedness secured thereby. If the mortgage debt be not then due, and the owner refuse to receive payment, with interest to date, the property may be held under the levy and sold subject to the mortgage lien. But in case the creditor desires to contest the validity or amount of the mortgage, he shall deliver to said officer, within said twenty-four hours, his affidavit, or that of his agent or attorney, that affiant believes such mortgage to be invalid or illegal, or that the amount claimed thereunder is in excess of the sum then due, upon receipt whereof the officer shall retain the property. And in any case he shall hold it for said twenty-four hours after receipt of such statement, to allow the creditor to make such affidavit. Nothing herein shall preclude the mortgagee from asserting his rights under the mortgage in any independent proceeding. ('97 c. 292 s. 15; '01 c. 355)

See § 4302.

**3475. Mortgage of crops**—Any provision in a mortgage on crops which by its terms shall mortgage or convey any crop to be grown later than during the season beginning May 1 next following the date thereof shall be void, except when the mortgage is given to secure a part or all of the purchase price or rent of the land upon which such crop is to be grown, but such provision

shall not affect the validity of any other stipulation or provision of the mortgage. ('97 c. 292 s. 16; '01.c. 320)

61-528, 63+1114; 93-36, 100+386.

### CONDITIONAL SALES

**3476. When void unless filed**—Every promissory note or contract of sale, conditioned that the title to the property for or on account of which the same was given shall remain in the vendor, shall be void as to creditors of the vendee and subsequent purchasers and mortgagees of such property in good faith, unless the note or contract, or a copy thereof, or if the contract be oral, a memorandum, signed by the purchaser and expressing its terms and conditions, be filed as in the case of a chattel mortgage. (4148, 4149; '97 c. 292 ss. 17, 18)

**1. Who protected**—Not creditors generally but only those who seize property under process (68-282, 288, 71+389; 93-91, 94, 100+670). Creditors of debtors who have made assignments (46-240, 48+1019; 69-69, 71+921; 71-292, 74+137).

**2. Held applicable**—To a consignment of goods (75-147, 77+791. See 52-216, 53+1147; 71-292, 74+137; 93-91, 100+670); to a sale of standing timber (68-282, 71+389); to an exchange of horses (39-210, 39+140).

**3. Held inapplicable**—To cash sales (44-224, 231, 46+342, 560; 63-242, 65+455); to a consignment of goods to an agent for sale (52-216, 53+1147); to a bailment (56-244, 57+657).

**4. Filing**—Must be filed where vendee resides at time of contract (91-79, 97+412). Held properly filed (56-401, 57+940).

**5. Notice**—Inapplicable to persons with actual notice (35-534, 29+345). Notice to assignee or receiver not notice to creditors (46-240, 48+1019). Filing not constructive notice to common carriers (51-345, 53+714).

**6. Burden of proof**—46-240, 48+1019; 83-351, 86+350.

**3477. Notice—Limit of time**—Every such note, contract, copy, or memorandum so filed shall be notice to all parties interested of the existence and conditions thereof, until the expiration of six years from date of filing thereof. (4150; '97 c. 292 s. 19) See 1905 c. 178

**3478. Satisfaction**—When any such contract has been fully performed on the part of the vendee, the vendor, his representatives or assigns, shall give duplicate satisfactions thereof, one of which he shall deliver to the person entitled thereto, and the other he shall file, at his own expense, with the officer having custody of the instrument so satisfied. Thereupon such officer shall deliver up the note, contract, memorandum, or copy to which the satisfaction relates. Such satisfaction need not be witnessed or acknowledged. (4152; '97 c. 292 s. 20)

### SEED GRAIN CONTRACTS

**3479. Agreement—Lien**—To secure a loan or purchase of seed grain, the person receiving the same shall execute to the vendor or lender a note or contract containing a statement of the amount and kind of seed, and the terms of the agreement relative thereto. Upon filing the same or a copy thereof, as hereinafter provided, said vendor or lender shall have a lien on the crop grown therefrom. (4155; '97 c. 292 s. 21)

Lien statutory. Transaction must be bona fide; grain must be actually furnished at the time; and the debt actually incurred on account of such furnishing (27-385, 7+821; 36-126, 30+445; 39-530, 41+105; 41-537, 43+477; 43-342, 46+336; 44-390, 46+773; 48-213, 50+1035). Burden on claimant to show compliance with all the requirements of the statute (58-536, 60+671).

**3480. Filing—Duration of lien**—To preserve said lien, the person furnishing seed as aforesaid, within thirty days after the execution of such note or contract, shall file the same, or a copy thereof, with the clerk of the town or municipality in which the land upon which the crop is to be grown is situated. Thereupon the lien shall continue for the term of one year from the date of filing, upon the crop growing or grown from such seed, to the amount and according to the terms of the agreement, against the owner and all creditors and purchasers. It shall not be affected by any exemption law, and shall take

precedence of all other liens and be notice of its existence to all persons. (4156; '97 c. 292 s. 22)

Place of filing (58-536, 60+671). Priority of lien over chattel mortgage (57-84, 58+827).

07 3481 46 **3481. Lienor may take possession**—The owner of such note or agreement and lien, at any time after condition broken, may take possession of the crop so grown, or so much thereof as he may be entitled to under the terms of his agreement, including the necessary expense of taking and sale, and such taking shall discharge the lien as to the remainder of the crop. (4157; '97 c. 292 s. 23)

Injunction (32-193, 20+85). Action for conversion by third party (39-530, 41+105).

07 3482 46 **3482. Chattel mortgage provision, how applicable**—All provisions of this chapter relating to chattel mortgages, not inconsistent with those relating to conditional sales and seed grain contracts, shall be applicable thereto, but neither shall require witnessing or acknowledgment. (4158; '97 c. 292 s. 24)

32-193, 196, 20+85.

## CHAPTER 68

### FRAUDS

#### STATUTE OF FRAUDS

**3483. No action on agreement, when**—No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

1. Every agreement that by its terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default, or doings of another.

3. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

4. Every agreement, promise or undertaking to pay a debt which has been discharged by bankruptcy or insolvency proceedings. (4209)

#### CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR

1. **Not void but simply non-enforceable**—A contract within the statute is not void but simply non-enforceable, that is, no action can be directly based thereon (36-473, 31+938; 42-6, 43+484; 81-316, 84+116; 85-257, 88+846; 87-172, 91+483. See 51-333, 53+642).

2. **Performance by one party within year**—The statute does not apply to a contract which is fully performed by one of the parties at the time, or which may be performed by one of them within a year (78-299, 80+1051).

3. **Possibility not probability of performance the test**—The statute is applicable only to contracts which cannot by their terms be performed within a year. Contracts which by their terms can possibly be performed within a year are not within the statute although the parties did not contemplate such performance (30-464, 16+363; 33-523, 86+760; 22-449).

4. **When year begins to run**—48-319, 51+216; 34-510, 26+906.

5. **Effect of part performance**—While no action can be maintained on an oral agreement for services not to be performed within one year, such agreement controls the rights and remedies of the parties with respect to what has been done, and fixes the value of the services rendered under it, when the person rendering such services is discharged after part performance, without fault on his part, or is unable to fully perform on account of sickness; and an action will lie in such cases for the value of such services as fixed by the contract (36-473, 31+938; 81-316, 84+116; 85-257, 88+846).

But where a person who has partly performed under such a contract refuses without legal excuse to fully perform and the other party is willing to go on with the contract, and is not in default, no recovery can be had for such part performance (42-6, 43+484). It seems that in an action to recover for a part performance it is not necessary to al-